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Fairness for Whom? Administration of the Fairness Doctrine, 1967-70

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COMMENT

FAIRNESS FOR WHOM? ADMINISTRATION OF THE FAIRNESS DOCTRINE, 1969-70†

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The fairness doctrine has generated a considerable amount of controversy over the past several years, and recent commentaries have amply discussed the legal and policy issues surrounding the doctrine.[1] Consequently this comment is not an explanation of the rationale or constitutional doctrine underlying the fairness doctrine, but rather an examination of the means used by the Complaints Branch of the Federal Communications Commission Broadcast Bureau to administer the doctrine.[2] A dual approach is employed. Initially, several FCC rulings are presented to illustrate the standards and their application. These cases are dramatic but not atypical samples which present the problems of the doctrine in sharp focus. Next, a systematic sample[3] of incoming correspondence to the Complaints Branch, taken in 1970, is presented in order to identify the sources and types of complaints and

† The initial research for this comment was conducted at the Washington offices of the Federal Communications Commission (FCC) during the summer of 1970 as part of the Boston College Law School Citizens Communications Center "T.V. Project."

While these comments necessarily reflect only the period covered by the study, the author, on the basis of subsequent discussions with FCC staff, believes that the described administrative procedures are an accurate reflection of present practices.

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1 See, e.g., The Editorial Responsibility of the Broadcaster: Reflections on Fairness and Access, 85 Harv. L. Rev. 768 (1972); Note, F.C.C. and the Fairness Doctrine, 19 Clev. St. L. Rev. 579 (1970); Note, The FCC Fairness Doctrine and Informed Social Choice, 8 Harv. J. Legis. 333 (1971); Note, Fairness Doctrine: Television as a Marketplace of Ideas, 45 N.Y.U.L. Rev. 1222 (1970).

2 The procedure and administration described herein are not, however, applicable only to the fairness doctrine. The "equal time" provisions of federal law, see note 53 infra, and the "personal attack" rules of the FCC, see note 52 infra, are logically related to the fairness doctrine and they are given similar administrative treatment.

3 The sample was designed to provide approximately 200 pieces of correspondence from a period of one year, beginning in mid-March 1969 and ending in mid-March 1970. The approximate number of log entries for that period was determined and selection of every thirteenth entry provided 196 items. A number between 1 and 13 was randomly chosen and the first item of the sample was the entry corresponding thereto. This technique provides a systematic sample as long as there is no periodicity in the listing in the logbook. F. Yates, Sampling Methods for Censuses and Surveys § 3.6 (3d ed. 1960); W. Wallis, Statistics: A New Approach §§ 4.6, 10.9-.11, 15.4-5 (1956); see also W. Cochran, Sampling Techniques ch. 8 (2d ed. 1963). A check with the personnel maintaining the logbook disclosed that mail is logged as it is received and is not arranged in any particular fashion that would distort the sample.

to provide a basis for evaluation of the FCC's current procedure as a means of protecting the right of the public to be informed about controversial issues of public importance.[4] As a preface to this examination of the administration of the fairness doctrine, a brief description of the doctrine is provided.

THE FAIRNESS DOCTRINE

Once broadcast facilities are used for discussion of a controversial issue of public importance, the fairness doctrine requires a broadcast licensee to present a balance of significant opposing viewpoints on that issue. Fairness requires that a station present contrasting viewpoints in its overall programming. It is measured in terms of the exercise of reasonable good faith judgment by the licensee. Thus exact equality of time is not required; as long as there is a reasonable balance, the licensee has complied with the fairness doctrine.[5]

Supplementing—and perhaps surpassing—the standard of fairness is the Supreme Court's decision in *Red Lion Broadcasting Co. v. FCC*.[6] The Court stated:

> It is the purpose of the First Amendment to preserve an uninhibited market-place of ideas in which truth will ultimately prevail, rather than to countenance monopolization of that market, whether it be by the Government itself or a private licensee . . . . It is the right of the public to receive suitable access to social, political, aesthetic, moral, and other ideas and experiences which is crucial . . . . That right may not constitutionally be abridged either by Congress or by the FCC.[7]

While the language of the Supreme Court is an unequivocal endorsement of the public's right to be informed, the bounds of this right remain uncharted. In attempting to protect the public's right to be informed, the FCC "believes" that a licensee must devote time to discussion of controversial issues and that reasonable coverage must be afforded to divergent views on those issues.[8] Paradoxically, however,

[4] See Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969).

[5] The paragraph in the text is derived from Applicability of the Fairness Doctrine in the Handling of Controversial Issues of Public Importance, 29 Fed. Reg. 10415 (1964) (hereinafter cited as Fairness Primer); see also Report on Editorializing by Broadcast Licensees, 13 F.C.C. 1246 (1949).

[6] 395 U.S. 367 (1969). This decision upheld the validity of FCC personal attack rules, see note 52 infra.

[7] Id. at 390.

[8] The F.C.C. and Broadcasting, FCC Form 100, at 6. As Commissioner Cox has written, FCC rulings "stress the duty to broadcast conflicting views on request rather than the obligations of licensees to devote reasonable time to controversial issues and

the FCC does not vigorously examine a licensee's performance; rather, it delegates a broad range of discretion to the licensee in his choice of programming.[9]

Failure to comply with the fairness doctrine violates the statutory requirement that broadcasters act in the "public interest, convenience and necessity,"[10] and may lead to revocation of a license;[11] however, milder remedies are usually administered.[12]

I. ADMINISTRATION

A. *Standards*

In its application to any specific broadcast, the fairness doctrine requires that three questions be answered.[13] The standards by which these questions are answered are imprecise; as will be shown, the amorphous nature of the questions necessitates highly subjective judgments. The threshold problem is the factual inquiry into the *content* of the broadcast. This first question can be further subdivided into inquiry concerning both the express and implicit content. Determination of the implicit content of a broadcast is the analogue of the Federal Trade Commission's "overall impression test," which is applied in cases of allegedly deceptive or misleading advertising.[14] This is a sensitive determination which depends upon individual perception: e.g., did cigarette ads convey a false image of healthful people? This example is obvious and thus fails to suggest the difficulties inherent in the analytical process. If the process is applied to advertising or programming generally the difficulties become more apparent. For example, do gasoline ads raise a question of adverse effects on an idyllically depicted countryside? Do army recruitment ads raise the question of

to act affirmatively to insure that both sides of issues are fairly presented." Cox, The Federal Communications Commission, 11 B.C. Ind. & Com. L. Rev. 595, 632 (1970). This stress would be altered if *Red Lion*'s mandate were fulfilled.

9 Fairness Primer, supra note 5, at 10416.

10 47 U.S.C. § 307(d) (1970).

11 47 U.S.C. § 312(a) (1970).

12 For a good discussion of the potential and actual remedies, see Comment, The Fairness Doctrine and Broadcast License Renewals: *Brandywine-Mainline Radio, Inc.*, 71 Colum. L. Rev. 452, 460-61 (1971).

13 These questions were distilled primarily from the case law and rulings of the FCC, but their use and importance to the administration of the doctrine were the subject of discussions with FCC staff, Commissioners (notably Cox and Johnson), other project staffers, and with Citizens Communications Center personnel. We found a haphazard application of the questions; some questions were asked in all cases, but no case was subjected to the scrutiny of examination under all three major questions. The FCC was not consistent in its application of the law except in looking for anything that could be called reasonable behavior on the part of the licensee. This is not a blanket condemnation—not all complaints were meritorious—but it is important to note that all complaints are not handled similarly.

14 See, e.g., Charles of the Ritz Distrib. Corp. v. FTC, 143 F.2d 676, 679 (2d Cir. 1944).

alternatives to military service? Obviously, the characterization given the content of a particular broadcast can be determinative; a finding that neither the express nor the implicit content of the broadcast conveys the alleged meaning effectively terminates further inquiry.

The second query is whether the content of the broadcast presents a viewpoint on a controversial issue of public importance. The controversial nature and importance of a given issue vary from broadcast area to broadcast area. For example, the teaching of evolution may be controversial in some areas, but not in others.[15] Furthermore, an issue may be controversial and important on either a local or national level, and local issues may become national through media coverage. While the law requires that the licensee be an expert in local affairs in order that it might determine whether a controversy exists, and, if so, whether it is important,[16] it fails to set standards by which that expertise can be measured.[17]

The third and final determination is whether the issue in question has been covered fairly in the station's overall programming. The licensee must present opposing viewpoints in a time and fashion reasonably equivalent to the original broadcast in order to expose the same or a reasonably similar audience to divergent and opposing views on controversial issues.[18]

Unfortunately, FCC inquiry into these three areas is superficial, often leaving the final resolution of each question to the licensees themselves.[19] Moreover, even if detailed inquiry is made, interviews with the Commissioners made in conjunction with the taking of the sample

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[15] David S. Tillson, C8-755, application for review denied Jan. 8, 1970, — F.C.C. 2d —; but see 19 F.C.C.2d 511 (1959). In the Complaints Branch of the Broadcast Bureau, incoming mail is designated with a code "C" followed by the number of the month in which it is received and another number identifying the document in the numerical order in which it was received that month. Thus C7-142 is the 142d letter received in the month of July in the Complaints Branch. The same numbers are recycled every year, so the designation is not fully complete. But the number alone does not enable one to readily locate the document; the number must be traced through the logbook for the identity of the station or network that was the offender. The letter will be found in the fairness doctrine file of that station. Letters that do not make reference to a particular station or network are filed alphabetically by name of complainant or correspondent. In this study, numbers C3- through C12- are from March through December 1969, C1- through C2- are from January and February 1970. The sample year began in the middle of March because that was the date on which the log year of the fairness office began.

[16] Report and Statement of Policy Re: Commission En Banc Programming Inquiry, F.C.C. 60-970, July 29, 1960, 20 P & F Radio Reg. 1901, 1915 (1960); Henry v. FCC, 302 F.2d 191 (D.C. Cir. 1962).

[17] Cf. Renewal of Standard Broadcast Station Licenses, 7 F.C.C. 2d 122 (dissenting opinions).

[18] See Comm. for the Fair Broadcasting of Controversial Issues, 25 F.C.C. 2d 283, 293 (1970).

[19] See note 13 supra.

of correspondence indicated that, at the time of the sample, two views on the issues of content and controversy were represented on the FCC. The majority inquired whether a licensee's judgment was reasonable on its face. Typical of the majority, Commissioner Wells stated that determination of whether a controversial issue of public importance existed was a sensitive, difficult question for which he had no clear standard. However, in Commissioner Wells' view, coverage by other media, legislative or executive action and the existence of concerned community organizations could be used as indicia.[20] This deference to the licensee's resolution of the three questions and the lack of inquiry standards have led to unsatisfactory and sometimes inconsistent rulings. For example, while cigarette ads raise the issue of public health,[21] gasoline ads may not;[22] a military recruitment ad does not necessarily imply that involvement in the military may be immoral;[23] debate concerning legalization of marijuana does not present a controversial issue of public importance;[24] and compliance with a court desegregation order does not raise a controversial issue of public importance.[25] The Supreme Court's emphasis on the public interest in *Red Lion* points to the weakness of the majority position: it is as remote from the spirit of *Red Lion* to permit the Commissioners to exercise broad standardless discretion as it is for them to delegate that discretion to licensees.

In contrast to the majority position, the minority would have imposed a more stringent standard by requiring the licensee to give an affirmative basis for his judgment through specific reference to the same indicia.[26] This minority position is substantiated by and derived from the requirement that a licensee maintain and advance his knowledge of local affairs.[27] It is submitted that enforcement of the more stringent minority standard would have precluded the more objectionable fairness decisions. For example, in *Alan F. Neckritz*,[28] which involved military recruitment advertisements broadcast in the San

[20] Interview with Commissioner Robert Wells, July 2, 1970.

[21] WCBS-TV, 8 F.C.C.2d 381 (1967), aff'd on reconsideration, Applicability of Fairness Doctrine to Cigarette Commercials, 9 F.C.C.2d 921 (1967), aff'd sub nom. Banzhaf v. FCC, 405 F.2d 1082 (D.C. Cir. 1968), cert. denied, 396 U.S. 842 (1969). See Whiteside, Annals of Advertising, 46 The New Yorker 42 (Dec. 19, 1970).

[22] NBC, F.C.C. 71-704, — F.C.C.2d — (1970); NBC, Telev. Station KNBC, et al, F.C.C. 71-526, — F.C.C.2d — (1971); Gary Soucie, Friends of the Earth, 24 F.C.C.2d 743 (1970).

[23] Cf. Alan F. Neckritz, 24 F.C.C.2d 175 (1970).

[24] J.F. Poland, C7-584, C8-58.

[25] John S. Warchak, C2-330 et seq., June 4, 1970, 23 F.C.C.2d 289 (1970).

[26] Interview with Commissioner Nicholas Johnson, July 21, 1970.

[27] See authorities cited in note 16 supra.

[28] Alan F. Neckritz, 24 F.C.C.2d 175 (1970). This case was in the sample and some facts given here rely upon the author's investigation of the file. See also Albert A. Kramer, 24 F.C.C.2d 171 (1970); Donald Jelinek, 24 F.C.C.2d 156 (1970) (especially dissent of Commissioner Johnson).

Francisco area, the FCC upheld the judgment of a station executive, whose office was not in the broadcast service area, that there was no local controversy over the advisability of enlistment in the military service. The complainant asserted that such a controversy was evident from the number of peace demonstrations and the exceedingly high rate of refusal of induction in the San Francisco Bay Area. Although a perusal of FCC files made during the sample showed that the files contained a letter from the Department of the Army commending the station for its efforts to induce an atmosphere conducive to military service, the FCC subjected the licensee to a test which required only that the position of the licensee not be unreasonable. The FCC found that the licensee was not unreasonable in saying that there was no local controversy concerning enlistment. Thus, while the station was required by law to be expert in local affairs, its expertise was apparently presumed in the adjudication of this fairness complaint.[29]

B. *Procedure*

Proper resolution of these fairness problems would appear to lie not only in the formulation of more precise standards but in the reallocation of the burden of pleading and proof. First, the inquiry process could be strengthened greatly if the FCC would honor two kinds of requests: (1) those for hearings, and (2) those for field investigations.[30] It is submitted that the adversary nature of the issues raised in fairness cases requires an investigation and an adjudicatory hearing if due process of law is to be fulfilled.[31] For example, when an unfair labor practice charge is filed with the National Labor Relations Board, a field investigation is undertaken;[32] if substantial and material factual questions arise the parties must be given a hearing.[33] The standards

[29] This problem is also the subject of Robert H. Scott, 25 F.C.C.2d 239 (1970). The majority maintained that the licensee's judgment concerning the existence of a controversial issue was not unreasonable. The minority asserted that no such decision was possible on the state of the record. Id. at 240-41. The FCC had not required the station to show any basis for its decision, and consequently there was no foundation upon which the FCC could itself evaluate the issue. The FCC did not intervene on behalf of the complainant, nor did it make any inquiry to the station.

[30] Prior to 1960, fairness questions were raised every three years at the time for renewal of a station's license. In 1960, the FCC established the Complaints and Compliance Division of the Broadcast Bureau to handle fairness questions on a day-to-day, complaint-by-complaint basis, to conduct ongoing studies of licensee performance, and to conduct field investigations of complaints. FCC, Minute item #20-X-60, July 11, 1960; see 19 P & F Radio Reg. 1631, 1632 (1960); 25 Fed. Reg. 4605 (1960). The ongoing studies have been discontinued, and field investigations based on programming complaints are rare. Interview with Commissioner Kenneth Cox, August 28, 1970.

[31] See 2 K. Davis, Administrative Law Text ch. 7 (3d ed. 1970).

[32] Section of Labor Relations Law, American Bar Association, The Developing Labor Law 833 (C. Morris ed. 1971). See 29 C.F.R. § 102.69(c) (1972).

[33] 29 C.F.R. §§ 102.69(c), (e) (1972).

governing the right to a NLRB unfair labor practice hearing are set out in the Code of Federal Regulations;[84] they fulfill the constitutional requirement of due process which also is applicable.[85] However, no court has ruled upon the due process issue as presented by the administration of the fairness doctrine,[86] and the FCC believes there is not sufficient staff or funds available to implement either investigations or hearings.[87]

Second, the party that has the greater ability to marshal the facts about questioned broadcasts and community issues—the licensee—should bear the burden of doing so. However, as matters now stand the complainant must plead six specific facts in order to trigger FCC inquiry to the licensee: (1) that a particular licensee (2) at a specific date and time (3) broadcast one side of a controversial issue, (4) that the issue is controversial in the station's service area, (5) the complainant's basis for stating the station has not covered opposing viewpoints and (6) that the licensee has not or does not plan to afford reasonable opportunity for the expression of opposing views.[88] Placing a further burden on prospective complainants, the FCC insists that a procedure such as "several days monitoring of news or public affairs programming" should be the basis for a fairness complaint.[89] Thus the burden of pleading detailed information regarding the station's past and future performance rests with the complainant, even though this information can be most easily obtained by the FCC from the licensee. Only after the complainant has met these burdens will the FCC request the licensee's comments or explanation. Consequently, a number of significant rulings have been issued without any FCC inquiry having been made to the station in question.[40]

As implied previously, fairness complaints do not elicit investigations or hearings;[41] they are contested entirely by correspondence. To aid complainants, the FCC has a battery of form letters outlining the applicable procedures, which are based on the FCC's pleading guidelines.[42] One would expect the FCC's pleading guidelines to be analogous

[84] Id.

[85] See NLRB v. Smith Indus., Inc., 403 F.2d 889 (5th Cir. 1968); NLRB v. Ortronix, Inc., 380 F.2d 737 (5th Cir. 1967); United States Rubber Co. v. NLRB, 373 F.2d 602 (5th Cir. 1967).

[86] While no case has ruled thus, see Bell v. Burson, 402 U.S. 535 (1971), for an indication of how the Court might rule.

[87] Interview with Commissioner Kenneth Cox, Aug. 28, 1970.

[88] Fairness Primer, supra note 5, at 10416, delineates five of these requirements. See note 42 infra.

[89] Business Executives Move for Vietnam Peace, 25 F.C.C.2d 242, 246 (1970).

[40] See, e.g., Alfred M. Lilienthal, July 13, 1970, — F.C.C.2d — (1970); Robert H. Scott, 25 F.C.C.2d 239 (1970); Robert G. Ryan, 23 F.C.C.2d 518 (1970), reconsideration denied, 25 F.C.C.2d 884 (1970).

[41] See text accompanying notes 30-37 supra.

[42] Until 1969, these form letters delineated only five of the six required elements

to the "notice" pleading of the Federal Rules of Civil Procedure rather than the more baroque fact pleading system of some states and the Field Code.[43] In fact, however, the thrust and complexity of the pleading requirements place the burden squarely on the complainant.[44]

A striking example of the incongruous result produced by the FCC's procedure is *E.J. Duffy*,[45] a complaint which was included in the instant sample. Correspondence between the complainant and the FCC extended over a period of six months, during which time the complainant repeatedly asserted his inability to obtain information from the station. The FCC assumed the position that the information required was a matter of public record, obtainable from the station. Consequently the FCC did not intervene on the complainant's behalf. The broadcaster proved uncooperative and, by the time the complainant's position was clear, had erased tapes of the broadcast, stating that it had done so in good faith. FCC action proved too tardy to preserve the best record of the substance of the questioned broadcast.

These general problems of burden of pleading, burden of proof, and lack of standards in determination of content and existence of a controversial issue of public importance have led to unsatisfactory administration of complaints. Delay in the administrative process has also resulted.[46] This delay has also been perpetuated by what appeared,

for a sufficient complaint; thus only persons with independent knowledge of the requirements were likely to perfect complaints. Interview with Richard R. Zaragoza, Aug. 28, 1970. See Staff of Subcomm. on Communication of Senate Comm. on Commerce, 90th Cong., 2d Sess., Report on Fairness Doctrine 57 (Comm. Print 1968). In addition to the form letters the FCC has a set of forty "stock paragraphs" from which it constructs responses.

[43] This expectation is enhanced when one considers that only 7% of complainants, as reflected in the systematic sample, are attorneys. The remaining 93% probably assume that the FCC will act as attorney for them in its role as a regulator.

[44] See generally Fairness Primer, note 5 supra.

[45] C3-397 (unreported, 1969).

[46] Interview with William B. Ray, Chief, Complaints and Compliance Division, Broadcast Bureau, July 1, 1970. The controversial issues arising under the fairness doctrine affect the conduct of public officials at every level of government and delay may postpone important considerations until after the decisions have been made. The following table illustrates the amount of time taken in ruling on some complaints:

Complainant	Date of Complaint	Date of Ruling	Number of Months
Batal	4/70	6/70	2
Boalt Hall Student Ass'n	12/68	3/69	3
Business Executives Move for Vietnam Peace	1/70	8/70	7
Cherry	11/69	10/70	11
DeFranco	8/69	8/69	(1 day)
Duckett	12/69	6/70	6
Friends of Earth	3/70	8/70	5

at the time of the sample, to be an extraordinarily high level of dissent and division among the FCC staff on fairness questions.[47] Such delay causes substantial injustice to complainants[48] and, by its very nature, produces irreparable injury. Monetary damages cannot compensate for a lack of fairness; the discussion of controversial issues is a fundamental element of the political process.[49]

Complainant	Date of Complaint	Date of Ruling	Number of Months
Healy	3/69	6/70	15
Jones	12/69	2/70	2
Kay	3/70	7/70	4
Lilienthal	11/68	7/70	20
Martinez	6/69	3/70	9
Neckritz	2/70	6/70	4
Ormsby	12/69	3/70	3
Ryan	3/70	6/70	3
Scott	9/69	8/70	11
Tillson	7/69	1/70	5
Warchak	2/70	6/70	4

[47] Interview with William B. Ray, supra note 46.

[48] Id.

[49] See Red Lion Broadcasting Co., v. FCC, 395 U.S. 367 (1969); see generally Meiklejohn, The First Amendment is an Absolute, 1961 Supreme Ct. Rev. 245. The workload of the Branch fluctuates with the winds of controversy:

Month	Complaints 1969	1970
Jan.		143
Feb.		213
Mar.	90	716
Apr.	160	312
May	246	274
Jun.	194	292
Jul.	660	
Aug.	252	
Sep.	535	
Oct.	227	
Nov.	174	
Dec.	441	
total	2979	1950
	Mar.-Dec. 1969	Jan.-June 1970

Station inquiries sent:	
Jun. 1969	11
Jul.-Aug.	16
Sep.	12
Oct.	7
Nov.	12
Dec.	9
Jan. 1970	13
Feb.	8
Mar.	12
	100

II. The Systematic Sample of Correspondence

The degree of difficulty a complainant encounters in arousing the FCC to action, along with the previously discussed burdens of pleading and proof, can be used as an index of whether or not the FCC is vigorously protecting the public's right to know. In order to illustrate this difficulty, a survey of systematically selected correspondence was conducted.[50] While the number of items surveyed was not large, the results do demonstrate the degree of difficulty encountered by complainants.

The sample examined in the instant survey consisted of 196 pieces of incoming mail received between March 1969 and March 1970.[51] Correspondence was categorized according to content: (1) original correspondence: inquiries that are possible complaints concerning violations of the fairness doctrine, personal attack rules[52] and section 315;[53] (2) follow-up letters to original correspondence: *i.e.*, responses to FCC form letters; (3) responses to inquiries sent by the FCC to allegedly offending licensees; (4) complainant replies to category three; (5) petitions for review or reconsideration of rulings; (6) requests for extension of time to file comments; (7) inquiries filed by third parties about a particular complaint of another person; (8) station letters to complainants where the FCC had made no inquiry to the alleged offender. Within these eight categories of correspondence, the distribution was as follows:

Calculations made from data in the logbook of the Complaints Branch. As these figures indicate, from March 1969 to June 1970, the number of complaints received monthly ranged from 143 to 716 and totaled 4929. However, from June 1969 to March 1970, only 100 station inquiries were sent by the FCC. The failure of the FCC to inquire into the other complaints may be attributed largely to the pleading requirements and the lack of standards for judging content and the existence of controversy.

[50] See note 3 supra.

[51] The FCC log year began in March 1969. The survey encompassed a full year; a shorter period might have been dominated by a single controversy. For example the Complaints Branch received nearly 300 complaints concerning one broadcast pertaining to air traffic control. See NBC, 22 F.C.C.2d 446, rev'd on reconsideration, 25 F.C.C.2d 735 (1970).

[52] If, during the presentation of views on a controversial issue of public importance, an attack is made upon the "honesty, character, integrity or like personal qualities" of an individual or clearly defined group, the licensee must, within one week of the broadcast, (a) notify the person or group attacked of the date, time and "identification" of the broadcast, (b) transmit a tape or transcript (or accurate summary if tape and transcript are unavailable) of the pertinent parts of the broadcast, and (c) offer the attacked person a reasonable opportunity to respond over the facilities of the station. 47 C.F.R. §§ 73.123, .300, .598, .679 (1972).

[53] 47 U.S.C. § 315 (1970) provides, with certain exceptions, that if a licensee permits a person who is a legally qualified candidate for any public office to use a broadcasting station, the licensee shall afford equal opportunity to all other candidates for that office.

Category	Number of Items	% Total Sample	% Fairness Shop Workload[54]
1	72	36.7	45.3
2	12	6.1	7.5
3	12	6.1	7.5
4	0	0.0	0.0
5	4	2.0	2.5
6	1	0.5	0.6
7	8	4.1	5.0
8	11	5.6	6.9

As is evident, over forty-five percent of the incoming fairness mail was original correspondence. These letters were complaints and letters of inquiry concerning broadcasts which may have violated the fairness doctrine, personal attack rules or section 315.[55] Of these letters in category one, thirty-six percent were filed by the FCC without any response. Some of these items were not answerable because they were written anonymously. The remainder of the unanswered correspondence consisted of copies of letters addressed to stations, networks, or to persons who allegedly had been attacked. In no case was it clear that any correspondent was fully aware of his rights under the fairness doctrine. The FCC filed these letters without forwarding available forms describing the fairness doctrine and the procedures for filing complaints. Possibly the FCC does so with the expectation that the broadcast stations, once contacted by the complainant, will resolve complaints fairly.

The remaining sixty-four percent of the original correspondence was answered. These answers took three forms: the form letters and letters composed of the stock paragraphs; station inquiries; and declaratory rulings. Fifty-two percent of the mail in category one was answered by form or stock paragraph letters. These letters contain quite detailed and thorough explanations of all aspects of the fairness doctrine and its administration. The principal inadequacy of this procedure is that it consumes time during which the licensee is not given notice of the complaint or of the FCC's interest therein. Eleven percent

[54] "Fairness shop workload" excludes 8 letters, or 4.1% of the total sample which did not deal with fairness matters and an additional 29 letters, or 14.8% of the total sample, which concerned controversial license renewals and were unavailable since they had been transferred to the general counsel.

In addition to the distribution described in the text, 39 letters, or 19.9% of the total sample, or 24.5% of the fairness workload, could not be located by relying on the logbook assignments. A quarter of these eventually were located but were not included within the review. Erroneous logbook entries caused this delayed identification. The remaining 15% of the systematically selected sample was never located; the FCC staff could not explain the loss. All percentages have been rounded to the nearest tenth.

[55] See note 53 supra.

of the cateory one correspondence prompted FCC inquiries to the stations.

The third type of response was the declaratory ruling. The two items which fell into this category are interesting because of the rapidity with which they were considered. One requested a section 315 ruling.[56] The request was made by a local station and the ruling was issued a month later.[57] The other was a request by a national network for a personal attack ruling. The ruling was issued the same day the request was received.[58] The FCC gave no reason for its decision, no standards were enunciated, and the ruling is of no value as precedent. The rapidity of these responses demonstrates the quickness with which the FCC can act when it is so disposed.

In sum, only eleven percent of the mail in category one resulted in inquiries by the FCC to the stations, while another one percent was subject to declaratory rulings. Thus only twelve percent of complainants were able, in their original correspondence, to make sufficient complaints to prompt the FCC to intervene immediately. The remaining eighty-eight percent of the complaints contained in category one correspondence were insufficient to elicit anything more than form response. At this initial level, these complaints did not provoke FCC investigation, inquiry addressed to the involved licensee, hearings or rulings. While time elapsed, the complainants were left to negotiate some resolution with the stations concerned; further, some complainants did not receive the FCC's form letters that describe the fairness doctrine. Unfortunately, this delay, and the fact that eighty-eight percent of the original complaints were not able to provoke without further correspondence an FCC investigation, inquiry to the licensee or a ruling, substantiate an inference that the complexity of the pleading burden imposed by the FCC is substantial and that the FCC is not protecting the public's right to know in as vigorous a manner as is possible.[59]

[56] See note 53 supra.

[57] Request for declaratory ruling, WBAX, C3-1204, April 21, 1969.

[58] Letter to Mr. DeFranco, CBS Network, C8-234, Aug. 8, 1969.

[59] Only five percent of the category-one correspondence contained inquiries from Senators or Congressmen. Nonetheless, these items receive a quality and character of treatment that is not awarded the ordinary complainant. First, responses to such inquiries are freshly typed, without regard to whether the content is the same as the form letters that are previously prepared for the ordinary public. This increases the administrative burden; ordinarily six copies, in addition to any original letters, are prepared. In the case of congressional inquiries, additional copies are also prepared for filing with the Chairman of the FCC. Second, unlike replies to ordinary complaints, replies to these inquiries are due in the office of the Chairman of the FCC within two weeks from the date of their submission to the staff. These responses are forwarded over the signature of either the Chairman or his assistant, depending upon the political status of the inquirer. While the results have not been shown to vary with the complainant's identity, several staff members revealed that congressional inquiries are answered faster than

Seven and one-half percent of the fairness workload was composed of category two "follow-up" inquiries. These were replies to the form letters, or letters inquiring about the status of previous complaints.[60] One particular item in this category highlights the problem of access to station records in regard to alleged personal attacks.[61] The complainant alleged an attack and stated that the station had promised a tape of the broadcast but had not sent it. The original complaint was filed without answer. The follow-up letter re-alleged these matters but was answered by a form letter which stated that the FCC could not determine whether an attack had been made and instructed the complainant first to contact the station and then to perfect his complaint if he was not satisfied. In contradistinction to this circuitous approach, forty-two percent of the items in category two resulted in inquiries to the station and eighty percent of these station inquiries were mailed within two weeks of receipt of the complainant's follow-up letter.

CONCLUSION

The basic argument of this comment is that the vague standards and the procedural burdens involved in the administration of the fairness doctrine impose a barrier which prevents or delays meaningful action upon the grievance of the average complainant. While the Supreme Court has strongly endorsed the public's right to be informed, the only means that is available on a day-to-day basis to insure that right seems to be an inefficient tool in the hands of the ordinary citizen. In order to insure realization of the aims of the fairness doctrine, simplification of the complaint procedure, more vigorous investigation and a clarification of fairness standards are necessary. Accordingly it is suggested that complainants be required to allege only facts necessary to put a specific licensee on notice that, in the ordinary course of viewing, members of the public have not seen significant presentation of opposing views by the licensee on a specific, previously covered, controversial issue.[62] The FCC should then forward a copy of each suffi-

ordinary complaints, and often consume more staff time than is necessary. This discriminatory treatment is not justified on the basis of the "public interest"; it is explained solely by protocol. (The identities of the staff who disclosed the information contained in this note are not being disclosed, at their request.)

[60] It was often difficult to distinguish between replies and inquiries. Letters often re-alleged facts, alleged new facts, or clarified matters while the dates of the letters and FCC records ambiguously showed that the forms could have been received by the complainant prior to his letter or that they might have crossed paths in the mail with the complainant's letter.

[61] E. Cerv, C3-1126 (1969). Mr. Cerv, attempting to prod the FCC to intervene, wrote: "Do I have a right to know what a station says about me over the air to the public without doing what [the station manager] said I should do: 'If you want to know why don't you listen to KHOW' . . . ." C2-1493.

[62] A public education campaign to familiarize the public with the processes of ad-

cient complaint to the station or network involved. The licensee should then be required to file a written reply, with a copy to the complainant, within a specified period of time, and demonstrate compliance or actual plans for compliance with the fairness doctrine. Disputes which are not adequately resolved at this juncture should be subject, at a minimum, to field investigations by FCC personnel. Ideally,[63] adversary hearings would follow in situations where questions of fact remain after the field investigation.

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ministering the fairness doctrine, perhaps on the networks, and at the networks' expense would be an interesting measure. At present there are aids available to inform the public. See N. Johnson, How to Talk Back to Your Television Set (1970).

[63] The essential point of the recommendation is the provision of facilities for hearings in fairness cases. These hearings should be made easily accessible to complainants and to station personnel. The location should be dictated by that consideration; the tendency to center all FCC broadcast business in Washington, D.C., where stations and networks have their legal counsel and where the FCC broadcast facilities are centered, should be avoided. It would seem that the best place to hold hearings would be the locale where the alleged violation occurred, where one could easily discover how controversial an issue might be, etc. Considering such factors, the FCC might be advised to employ local attorneys as hearing officers on a case-by-case basis to provide adjudicatory hearings for complainants. Financial soundness could only be judged by protecting the workloads of such officers.